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Winning is exalted in our society. We grew up watching sporting events that glorified the victors. These winners were our heroes. Losers were, well, losers. In this column, I laud the value of losing and salute our legal losers. Like many others, I was inspired by a legendary fictional loser to enter the legal profession. Atticus Finch, a small-town Alabama lawyer and the hero of *To Kill a Mockingbird*, defended Tom Robinson, a black man, against criminal rape charges despite the disapprobation of Finch's fellow townspeople. Finch lost. His client was convicted resoundingly by an all-white jury.

Photo: Joe Shymanski

# LOSERS

## *Our Unsung Heroes*

Finch's willingness to take on the case, a sure loser, was born out of his dedication to the right to representation for criminal defendants — a right guaranteed by the Sixth Amendment. His principled and moral defense, which resulted in an unequivocal loss, makes him a role model and an inspiration for lawyers and many others. As *Law & Order* fictional prosecutor Jack McCoy once noted, "The benchmark of a civil society is the quality of its justice system." Our public defenders and other criminal defense attorneys shoulder more than their fair share of losses and do so to ensure that the Sixth Amendment right to counsel is not an empty promise. Because of their losses, society wins.

Prosecutors, as well, have shown courage in pursuing "loser" cases when principle is at stake. For example, prosecutors who bring criminal charges arising out of police misconduct face an uphill battle, yet they do so to hold police officers accountable, address injustice, and protect the integrity of our justice system.

Loss also plays a critical role in achieving social change. Among the most memorable pro bono representations undertaken by our firm was that of Lt. Tracy Thorne in 1992. As Thorne recounts, "In early 1992 as a young Naval flight officer, I was grappling with the numerous issues any gay man faces in coming out, not the least of which was the military's then outright ban on gay service members. I knew that being honest about who I was would likely cost me my commission and my career . . . I knew I needed counsel, but at that time, the various advocacy groups with staff counsel had written off the military challenge as being unwinnable."

Few firms at the time would take on military discharge cases because the likelihood of success was so slim. But Thorne's record of excellence and achievement was so impressive

that the injustice of denying him the right to serve his country compelled our firm to assemble a "dream team" of lawyers. We represented him in military discharge hearings, in federal district court, on appeal to the D.C. Circuit, and when he testified before Congress. At every turn, the team and Thorne lost. His dream job foreclosed, Thorne left the military and pursued a legal career, initially as a prosecutor. On March 1, 2013, Tracy Thorne-Begland was sworn in as the first openly gay judge in Virginia, serving on the general district court in Richmond.

On the morning of September 23, 2011, I picked up the *Washington Post*, and after reading the headline announcing President Obama's lifting of the ban against gays in the military, a wave of emotion came over me. I felt like Tracy's case and all his losses had played some role in this change. Later that day I received a call from Tracy, and he echoed what I felt — that his losses and those of other courageous individuals who had challenged the ban undoubtedly influenced the sea change in the policy. When I told a public interest advocate this story, she said, "Social change is often built upon a mountain of losses and setbacks."

Nowhere is this more true than in the history of the passage of the 19th Amendment granting women the right to vote 100 years ago. In reading Elaine Weiss's book *The Woman's Hour: The Great Fight to Win the Vote*, I was struck by the number of losses and setbacks the suffragists encountered. Yet, they built on those losses to ultimately succeed.

Congress first considered the "Anthony Amendment," introduced by Sen. Aaron Sargent, in 1878. After the Senate declined to vote on the measure, decades passed before it was reintroduced in 1917. On January 10,

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1918, in the midst of World War I, the House voted 274 to 136 to pass a constitutional amendment granting women the right to vote, but the proposal failed in the Senate. The amendment ultimately passed on May 21, 1919, by a vote of 304 to 90. Then the real battle began — ratification by three-fourths of the states. The roller coaster of wins and losses of the ratification campaign, particularly in Tennessee, the final state to ratify, is detailed suspensefully in *The Woman's Hour*. As Weiss summarizes, “Winning the vote required seventy-two years of ceaseless agitation by three generations of dedicated, fearless suffragists . . . The women who launched the movement were dead by the time it was completed; the women who

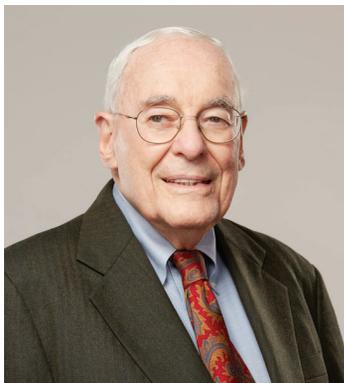
secured its final success weren't born when it began.”

I dedicate this column to the public defenders, the criminal defense attorneys, the legal services lawyers, and the public interest attorneys who focus not on their win-loss record but rather on maintaining the integrity of our justice system and bettering our society. They are our heroes. Henry Wadsworth Longfellow poetically captures their essence: “Not in the clamor of the crowded street, not in the shouts and plaudits of the throng, but in ourselves, are triumph and defeat.”

*Jusan M. Hoffman*

In Memoriam

**Donald R. Dunner** | May 12, 1931 – October 16, 2019



The D.C. Bar Pro Bono Center gratefully acknowledges the members of Finnegan, Henderson, Farabow, Garrett & Dunner LLP and other generous colleagues and friends of Donald R. Dunner for their outpouring of support following the recent loss of their partner, friend and mentor.

Contributions to the Pro Bono Center for the Donald R. Dunner Fund for Legal Services will allow us to carry on Don's tremendous legacy of service to our community as we provide free legal help to our neighbors most in need.

We extend our deep condolences to the Dunner family, and join the community in mourning the loss of a gracious leader, great friend, and true champion of equal access to justice.

For information about making a gift to the Donald R. Dunner Fund for Legal Services, please contact Angela Boone at 202.780.2733 or [aboone@dcbar.org](mailto:aboone@dcbar.org).

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